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EXAMINER
AUGHENBAUGH, WALTER

ART UNIT	PAPER NUMBER
1772	5

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Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 09/887,836	Applicant(s) BRADLEY, JAMES S.
	Examiner Walter B Aughenbaugh	Art Unit 1772

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *25 November 2002* .

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-5 and 11-13* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-5 and 11-13* is/are rejected.

7)☒ Claim(s) *2 and 11-13* is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☒ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other:

DETAILED ACTION

Acknowledgement of Applicant's Amendments

1. The amendments made to pages 1 and 4 of the specification given in pages 1-3 and 14-16 of Applicant's Amendment (Paper #4) have been received and considered by Examiner.

2. The amendments made in Claims 1, 2, 11 and 12, and the addition of new claim 13 given in pages 3-5 and 16-17 of Applicant's Amendment (Paper #4) have been received and considered by Examiner.

3. Examiner acknowledges the cancellation of claims 6-10 as being drawn to a nonelected invention on page 4 of Paper #4.

NEW OBJECTIONS

4. The amendment filed November 25, 2002 is objected to under 35 U.S.C. 132 because it introduces new matter into the disclosure. 35 U.S.C. 132 states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows: "aluminum coated polyethylene (PE), aluminum coated oriented polypropylene (OPP), aluminum coated nylon" and "aluminum oxide coated polyester, aluminum oxide coated OPP" and "acrylic coated PET" (page 5, lines 3-7 as amended and claim 2 as amended). The amendment to claims 11 and 12 and new claim 13 recites "polyether" and "polyester" species that are not supported in the specification. Page 3, lines 7-9 of the specification disclose that the adhesive contains "polyether urethanes, polyester urethanes and polyurethanes". This statement does not support the amendment of the claims to include the "polyether" and "polyester" species, both of which are broader than the "polyether urethanes, polyester urethanes" species disclosed in the specification.

Applicant is required to cancel the new matter in the reply to this Office Action.

5. Claim 13 is objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claim(s), or amend the claim(s) to place the claim(s) in proper dependent form, or rewrite the claim(s) in independent form. The limitation recited in claim 13 "said resin is selected from the group consisting of: polyether, polyester and polyurethane" is recited in claim 12.

WITHDRAWN REJECTIONS

6. The 35 U.S.C. 112 rejection of claims 1, 2 and 12 of record in Paper #3, page 4, paragraph 9 has been withdrawn due to Applicant's amendments in Paper #4.

7. The 35 U.S.C. 102(b) rejection of claim 11 as anticipated by Omura et al. of record in Paper #3, page 5, paragraph 11 has been withdrawn due to Applicant's amendments in Paper #4.

8. The 35 U.S.C. 103(a) rejection of claim 12 over Valyi in view of Satoh et al. and in further view of Narsutis et al. and Omura et al. of record in Paper #3, pages 8-10, paragraph 14 has been withdrawn due to Applicant's amendments in Paper #4.

REPEATED REJECTIONS

9. The 35 U.S.C. 103(a) rejection of claims 1-5 over Valyi in view of Satoh et al. of record in Paper #3, pages 6-8, paragraph 13 has been repeated for the reasons previously of record.

The amendments to claims 1 and 2 do not necessitate a new rejection; the added limitation to claim 1, that the adhesive layer is "in contact with both said outer and inner layers" is met by the structure taught by Valyi as previously made of record in Paper #3, paragraph 13, page 6, and Valyi teach the bilayer combination of polyvinylidene chloride (PVDC) and

polyester as a material of the outer layer of Valyi as previously made of record in Paper #3, paragraph 13, page 7.

NEW REJECTIONS

Claim Rejections - 35 USC § 112

10. The following is a quotation of the first paragraph of 35 U.S.C. 112:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

11. Claims 2 and 11-13 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

The amendments to claim 2 recite the following recitations which constitute new matter: "aluminum coated polyethylene (PE), aluminum coated oriented polypropylene (OPP), aluminum coated nylon" and "aluminum oxide coated polyester, aluminum oxide coated OPP" and "acrylic coated PET". The amendment to claims 11 and 12 and new claim 13 recites "polyether" and "polyester" species that constitute new matter because these recitations are not supported in the specification. Page 3, lines 7-9 of the specification disclose that the adhesive contains "polyether urethanes, polyester urethanes and polyurethanes". This statement does not support the amendment of the claims to include the "polyether" and "polyester" species, both of which are broader than the "polyether urethanes, polyester urethanes" species disclosed in the specification.

Claim Rejections - 35 USC § 103

12. Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Omura et al. in view of Satoh et al.

Omura et al. teach an adhesive composition for forming an adhesive film (col. 5, lines 50-56). The composition comprises a resin that consists of one of the polymerizable monomers disclosed on col. 6, lines 7-42. The composition also comprises a curing agent (col. 6, lines 42); therefore, the resin is cured. Omura et al. teach the inclusion of the antioxidant 2,6-di-tert-butyl-p-cresol (BHT), also known as butylated hydroxytoluene in the amount of up to a maximum of 10 parts per 100 parts by weight of the polymerizable monomers (col. 31, line 22), corresponding to a maximum of 100,000 parts per million; the claimed range of Omura et al. consequently overlaps with the claimed range of the instant application.

Omura et al. fail to teach that the cured adhesive resin is selected from the group consisting of polyether, polyester and polyurethane, and that the cured adhesive resin is applied from 0.00005 to 0.001 dry pounds per square foot of a substrate.

Satoh et al., however, disclose a thermoplastic laminate film comprising an improved adhesion layer formed from a resin composition comprising a polyester graft copolymer and a polyurethane resin (col. 2, lines 18-29), where the film has superior adhesion between a substrate and the improved adhesion layer (col. 2, lines 9-12). Satoh et al. further teach the inclusion of a curing agent in the resin composition (col. 17, lines 19-20) and the inclusion of an antioxidant (col. 4, line 15). Therefore, one of ordinary skill in the art would have recognized to have replaced the adhesive of Omura et al. with the polyester graft copolymer and polyurethane resin

of Satoh et al. since Satoh et al. teach that the polyester graft copolymer and a polyurethane resin affords an improved adhesive layer.

In regard to the claimed adhesive application amount of from 0.00005 to 0.001 dry pounds per square foot of a substrate, Satoh et al. disclose that the adhesive is applied to a substrate in an amount of 0.08 dry g/m^2 (col. 21, lines 23-31). The amount of 0.08 g/m^2 is equivalent to 0.00002 pounds per square foot. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have varied the adhesive application amount via routine experimentation in order to determine the optimal adhesive application amount necessary to achieve the desired degree of adhesion between the substrate and the improved adhesion layer of Satoh et al. depending on the particular desired end result, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art in the absence of unexpected results. *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

13. Claims 12 and 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Valyi in view of Satoh et al., and in further view of Narsutis et al. and Omura et al.

Valyi and Satoh et al. teach the container and adhesive composition as discussed above. Furthermore, Satoh et al. teach that the organic solvent which the graft polymerization of the cured adhesive resin is performed is evaporated (col. 7, lines 47-52); the adhesive resin is therefore solventless upon completion of formation of the adhesive resin of Satoh et al. Examiner reminds Applicant that the method of forming the adhesive resin is not germane to the issue of patentability of the adhesive resin itself; the composition of solely the final product is afforded patentable weight. As Satoh et al. teach that the organic solvent used in the formation

of the adhesive resin is evaporated, Satoh et al. teach that the final product is solventless. Satoh et al. also teaches that the adhesive composition comprises a polyester graft copolymer and a polyurethane resin (col. 2, lines 18-29) as previously made of record in Paper #3, page 6, paragraph 13 and as reiterated in the rejection to claim 11 in this Office Action (Paper #5).

Valyi and Satoh et al. fail to teach a flap extending from at least one side of the package, where a resealable peel antioxidant adhesive is applied to surface of the flap and also fail to teach that the cured adhesive resin has a vapor transmission rate of greater than 0.2 grams per 100 square inches per day at 70°F and also fail to teach that the butylated phenolic antioxidant is present in a concentration between 1000 and 100,000 parts per million.

In regard to the flap limitation, Narsutis et al. teach a resealable package with flap 30 having a resealable peel seal adhesive, and further teach that the resealable peelable adhesive is applied to the flap 30 (col. 5, lines 29-35 and Figures 1-7) to enable the user to reseal the package after removing a portion of its contents. Therefore one of ordinary skill in the art would have recognized to apply the antioxidant adhesive of Valyi and Satoh et al. to the flap 30 of Narsutis et al. in order to enable the user to reseal the package after removing a portion of its contents as taught by Narsutis et al.

In regard to the limitation that the butylated phenolic antioxidant is present in a concentration between 1000 and 100,000 parts per million, Omura et al. teach the inclusion of the antioxidant 2,6-di-tert-butyl-p-cresol (BHT), also known as butylated hydroxytoluene in the amount of up to a maximum of 10 parts per 100 parts by weight of the polymerizable monomers (col. 31, line 22), corresponding to a maximum of 100,000 parts per million. Since Omura et al. establish an antioxidant concentration of up to 100,000 parts per million as a suitable

concentration to use in an adhesive composition, one of ordinary skill in the art would have recognized to use an antioxidant concentration of between 1,000 and 100,000 parts per million by weight as taught by Omura et al.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have applied the antioxidant adhesive of Valyi and Satoh et al. to the flap 30 of Narsutis et al. in order to enable the user to reseal the package after removing a portion of its contents as taught by Narsutis et al., and to have used an antioxidant concentration of between 1,000 and 100,000 parts per million by weight of the adhesive composition of Valyi and Satoh et al., since Omura et al. teach that an antioxidant concentration of up to 100,000 parts per million as a suitable concentration to use in an adhesive composition.

In regard to the limitation that the cured adhesive resin has a vapor transmission rate of greater than 0.2 grams per 100 square inches per day at 70°F, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have tailored the material of Valyi and Satoh et al. according to molar amounts of polyester and polyurethane in the composition, etc. in order to achieve a vapor transmission rate of greater than 0.2 grams per 100 square inches per day at 70°F, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art in the absence of unexpected results. *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

ANSWERS TO APPLICANTS ARGUMENTS

14. Applicant's arguments on page 6 of Paper #4 as to the reasons that the amendments to the specification on page 5 and to claim 2 do not constitute new matter have been fully considered but are not persuasive.

The newly recited aluminum, aluminum oxide and acrylic coatings do not "find inherent support in the specification and the claims as filed in the recitation that the inner layer being a polymeric material having a higher vapor transmission rate than the outer layer" as asserted by Applicant. The original disclosure discloses solely that polyethylene terephthalate is aluminum coated (page 3, line 5). The original disclosure discloses solely that polyethylene terephthalate is aluminum oxide coated (page 3, line 6-7). The original disclosure discloses solely that polypropylene is acrylic coated (page 3, line 7). The recitation "layers thereof, coatings thereof and combinations thereof" (page 3, lines 7-8) does not incorporate the added coatings because the original disclosure requires that the aluminum, aluminum oxide and acrylic coatings be applied to the polyethylene terephthalate (in the case of aluminum and aluminum oxide coatings) and polypropylene (in the case of acrylic coating). The specification is silent as to coating any of the other species with aluminum, aluminum oxide or acrylic coatings. In regard to Applicant's argument that "absent the propagation of "aluminum coated" to modify polyethylene and oriented polypropylene, then the relative vapor transmission rate differential is not satisfied", this needed to be recited in the original disclosure. Furthermore, provided the appropriate choice of materials for the inner and outer layers, this assertion is not necessarily true.

15. Applicant's arguments on page 8 of Paper #4 regarding the 35 U.S.C. 102(b) rejection of claim 11 as anticipated by Omura et al. are rendered moot due to the new 35 U.S.C. 103(a) rejection of claim 11 over Omura et al. in view of Satoh et al. made of record in this Office Action (Paper #5).

16. Applicant's arguments on pages 8-11 of Paper #4 regarding the 35 U.S.C. 103(a) rejection of claims 1-5 over Valyi in view of Satoh et al. have been fully considered but are not persuasive.

In regard to Applicant's argument that "the cited structure of Valyi is not that of a container or finished article, but rather a liner about which an outermost layer is injection molded" and Applicants arguments from page 10, line 22 – page 11, line 5, Applicant's claim a "packaging laminate". The liner of Valyi relied upon in the rejection of claims 1-5 (Paper #3) is a "packaging laminate". Applicant's claims do not preclude an additional layer such as the "outermost layer" of Valyi. In response to Applicant's argument that Valyi includes additional structure not required by Applicant's invention, it must be noted that Valyi discloses the invention as claimed. The fact that it discloses additional structure not claimed is irrelevant.

Valyi does indeed teach that the multilayer "liner" is formed in a container structure as previously made of record (see also col. 8, lines 5-19). Furthermore, the limitations on which the Applicant relies (i.e. a container structure) are not stated in the claims. It is the claims that define the claimed invention, and it is the claims, not specifications that are anticipated or unpatentable. *Constant v. Advanced Micro-Devices Inc.*, 7 USPQ2d 1064.

Applicant's argument that "the oxygen permeability for the outermost layer and barrier layer of Valyi are predominately contrary to the claimed invention in that the barrier layers contemplated by Valyi have lower oxygen gas permeabilities, as compared to outermost layers [of Valyi]" is irrelevant because the rejection of claims 1-5 (Paper #3) does not rely on the "outermost layer" of Valyi. As previously made of record, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have selected particular materials

for layers 83 and 84 based on the respective gas transmission rates of the well known barrier polymers in order to produce the film of Valyi having an inner layer that has a gas transmission rate that is greater than that of the outer layer as taught by Valyi. Examiner wishes to reiterate that the "outer layer" as claimed by Applicant is one of the barrier layers 83 and 84 of Valyi as is clear in the rejection of claims 1-5 (Paper #3), and not the "outermost layer" of Valyi as Applicant's are arguing. The "liner" that Applicant points out that consists of barrier layers 83 and 84 and carrier layer 85 between them, which is the structure relied upon in the rejection of claims 1-5 (Paper #3) is indeed a packaging laminate as claimed by Applicant. Applicant's statement that the "laminates disclosed are only in the context of injection and blow molding" is irrelevant because the method of forming the laminate is not germane to the issue of patentability of the laminate itself.

In response to Applicant's argument in the sentence bridging pages 9 and 10 of Paper #4 that there is no suggestion to combine the references, the Examiner recognizes that references cannot be arbitrarily combined and that there must be some reason why one skilled in the art would be motivated to make the proposed combination of primary and secondary references. *In re* Nomiya, 184 USPQ 607 (CCPA 1975). However, there is no requirement that a motivation to make the modification be expressly articulated. The test for combining references is what the combination of disclosures taken as a whole would suggest to one of ordinary skill in the art. *In re* McLaughlin, 170 USPQ 209 (CCPA 1971). References are evaluated by what they suggest to one versed in the art, rather than by their specific disclosures. *In re* Bozek, 163 USPQ 545 (CCPA 1969). The reason Applicant provides as to why there is no motivation to combine the references, "the necessity to subsequently blow mold the liner of Valyi and in the process match

the deformability between the thermoplastic laminates of Valyi", is irrelevant because the method of forming the laminate is not germane to the issue of patentability of the laminate itself. Furthermore, the claims do not require that the "packaging laminate" be formed in any particular shape as discusses in the previous paragraph of this Office Action.

Applicant's assertion that the polyurethane resin is uncured is false. Satoh et al. teach that one of the major components of the polyurethane-forming component a crosslinking agent (col. 11, lines 30-32); therefore, the polyurethane is therefore crosslinked. Applicant does not otherwise elaborate on why the combination of the two references is impractical with regard to the polyurethane resin which is indeed cured. Applicant's arguments on page 10, lines 5-15 rely on the method of forming the article of Valyi, which is not germane to the issue of patentability of the laminate as claimed by Applicant. Impracticalities of the methods taught by Valyi and/or Satoh et al. are irrelevant to the patentability of the laminate as claimed; the structure and composition are the sole issues considered in determining patentablity of an article.

Applicants arguments from page 10, line 22 – page 11, line 5 have been addressed above in this Office Action and this paragraph. In response to Applicant's assertion that "Valyi lacks a motivation to promote gaseous exchange between an intermediate layer containing an antioxidant by way of an inner layer while the outermost layer is essentially impenetrable to the exterior environment", the fact that Valyi teach an inner layer (item 83 or 84) that has substantial but incomplete resistance to gas permeation (col. 2, 24-25) as previously made of record in Paper #3 is a clear teaching of "gaseous exchange between an intermediate layer containing an antioxidant by way of an inner layer"; the placement of an inner barrier layer that has substantial but incomplete resistance to gas permeation such that the inner barrier layer is in contact with the

space inside of the container of Valyi teaches gas exchange between the inside of the container and the intermediate layer by way of the inner barrier layer. Furthermore, the limitations on which the Applicant relies (i.e. an essentially impenetrable outermost layer and any sort of container structure comprising an enclosed inner space as implied in Applicant's argument) are not stated in the claims. It is the claims that define the claimed invention, and it is the claims, not specifications that are anticipated or unpatentable. *Constant v. Advanced Micro-Devices Inc.*, 7 USPQ2d 1064. Applicant claims merely a "packaging laminate" and assigns no structure or shape to the laminate (such as a container with an enclosed inner space). Applicant's claim that the "inner layer [has] a gas transmission rate greater than that of [the] outer layer", not an "essentially impenetrable outermost layer". Again, the "outermost layer" of Valyi is not relied upon in the rejection to claims 1-5 (Paper #3). In response to Applicant's argument that the Examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill in the art at the time the invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. *In re McLaughlin*, 443 F.2d 1392; 170 USPQ 209 (CCPA 1971). Valyi teaches gas exchange between the space adjacent the inner layer and the intermediate layer by way of the inner barrier layer as discussed above.

Applicant's arguments on pages 11-12 of Paper #4 regarding the 35 U.S.C. 103(a) rejection of claim 12 over Valyi in view of Satoh et al., and in further view of Narsutis et al. and Omura et al. are rendered moot due to the new 35 U.S.C. 103(a) rejection of claims 12 and 13

over Valyi in view of Satoh et al., and in further view of Narsutis et al. and Omura et al. made of record in this Office Action (Paper #5).

Conclusion

17. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

18. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Walter B Aughenbaugh whose telephone number is 703-305-4511. The examiner can normally be reached on Monday-Friday from 9:00am to 5:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Pyon, can be reached on 703-308-4251. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9310.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

HAROLD PYON
SUPERVISORY PATENT EXAMINER 2/6/03

wba
01/29/03 WBA